IN THE

Supreme Court of the United States

October Term, 1960

No. 245

CHARLES E. SMITH, as Special Administrator of the Estate of Edward S. Birn, Deceased,

Petitioner,

vs.

MILTON STERLING, JACK L. WARNER, UNITED STATES PICTURES, INC., WARNER BROS. PICTURES, INC., and HERBERT FRESTON, MILTON STERLING, REA E. WARNER and DORIS WARNER VIDOR AS EXECUTORS OF THE ESTATE OF HARRY M. WARNER, DECEASED,

Respondents.

PETITIONER'S REPLY.

The opposing arguments illustrate and deepen the sorry spectacle of how rocky the road can be made for the American shareholder who dares to venture to expose corporate machination, even in a transparently controlled corporation; in a day and age in which "effective working control" of publicly-owned companies has come to be traded in as a virtual commodity—bought and sold as such daily.

For nearly 10 years (1948-1958) spurious protests by the Warners that the corporation was *not controlled by them* provided an insurmountable obstacle (the first of two such obstacles) in petitioner's path to obtaining a day in court on the merits—something that he still has not had.

By the time the case came on for trial after remand—this is not gainsaid by the respondents—a number of amendments, reamendments and supplements to the Warner United contracts had been made, *all of which* [illegible] *a* [illegible] *to* [illegible] that had poured millions of *Warner* money into financing "independent" production by United and into the cost of distributing by Warner a series of motion pictures, in the course of which large payments of *Warner* money were made to United and by United to Sperling. . .

Nor do respondents gainsay—indeed they concede, as they must, that at the 1958 hearing petitioner claimed

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[illegible] the [illegible] 1958 [illegible] 20 [illegible] were not shown to control the corporation [R. p. 75]. That [illegible] the [illegible] of the "proxy-sin" jurisdictional problem, that was not settled until 1958 when this Court reversed the lower courts and remanded the case for a hearing on the merits.

not only had these expiring Warner-United contracts and the amendments unwarrantedly favored the president's son-in-law, but, throughout the 10-year period that it took to settle the jurisdictional problem, *these contracts had been openly maladministered*, and that *at issue* were a series of *specifically identified* Warner-United-Sterling transactions under these expiring contracts which transactions, though challenged by petitioner that "they resulted in more than a million dollars of colorable, purposefully contrived, illegal, *ultra vires* bonus payments[2] to the president's son-in-law, these huge payments to United and to Sterling were *refused scrutiny* and *excluded from consideration* by the District Judge.

Exposure by petitioner at the 1958 hearing of how a bogus had been the Warners' protests about *no control* was followed by their protest that "effective working control" still does not evidence "domination" by them of the Board which handed down a "Business Judgment" against lending directorial "sanction" to a *judicial* determination from evidence painstakingly assembled and *already* before the court whether the Warner son-in-law was or was not made the beneficiary of an *illegal* million-dollar windfall.

This second obstacle to the proof of "domination" by the accused industries has been equally efficacious in blocking and barring a decision on the merits.

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[2] [illegible]

We urge on behalf of the petitioner, that to so focus the "Business Judgment Rule" is to make it spectacularly repugnant to equity: The rule looms up as a royal road to the dispensing of prequisites with impunity; a refuge—a haven for influential possessors of and traders in corporate control of publicly-owned companies who, operating behind respectable "fronts"[3] are rendered virtually immune against successful attack although they siphon off and give away millions of confiding stockholders' money[4] to strategically-placed relatives.

We submit that respondents' intimations to the effect that the state courts' view of the problem presented does not square with the federal view, are not borne out by the authorities cited.

Respectfully submitted,

HERMAN H. LEVY,

GEO. C. LYON,

MOSS, LYON & DUNN,

Attorneys for Petitioner.

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[3] Dummy Directors Who Do Not Direct, 47 Harv. Law Rev. [illegible] 1905.

[4] As recently [illegible] weeks ago, the nationally syndicated [illegible] reported [illegible] that an extensive [illegible] investigation by the N. Y. Stock Exchange reveals that [illegible] stocks [illegible] what sort of investment they [illegible] "This degree of [illegible] is particularly [illegible] and concern [illegible] are becoming [illegible]" Editor, Los Angeles Mirror, Aug. 1, 1958.